
PUBLIC BANK BHD.

v.

PHAN SENG KEE & ORS.

HIGH COURT MALAYA, IPOH

PEH SWEE CHIN J

[ORIGINATING SUMMONS NO. 31-372-88]

14 DECEMBER 1990

CONTRACT: *Sale of land - Conditions of sale - Time of the essence - Payment of balance of purchase price - Forfeiture - Extension of time - Whether Court has jurisdiction.*

LAND LAW: *Default by chargor - Order for sale - Auction - Successful bidders - Conditions of sale - Time of the essence - Caveat lodged by chargor - Bidders unable to pay balance - New charge could not be registered - Extension of time - Contractual freedom - Detriment to chargor - National Land Code 1965, s. 257.*

The plaintiff chargee (PBB) obtained an order of sale for land owned and charged by the defendant chargor (PSK). The land was sold to successful bidders (the interveners in this action). The bidders paid the 10% deposit and obtained a loan from UMBC. The bidders, UMBC and PBB agreed that the balance of the purchase price was to be deposited with PBB's solicitors, who would only pay PBB upon registration of a new charge executed in favour of UMBC, which was to be contemporaneous with the registration of a certificate of sale. The bidders were required to pay the balance within 3 months of the date of sale. The conditions of sale stipulated that time was to be of essence of the contract.

The certificate of sale and the new charge could not be registered due to the presence of a caveat lodged by a borrower of money to whom the property was charged. Consequently, PBB's solicitors could not pay the balance of purchase price within the 3 months. PBB then filed an application for removal of the caveat, the hearing of which was still pending. Subsequently PBB filed an extension of time for payment of the balance of the purchase price payable by the bidders within 30 days from the date of the order removing the caveat. The bidders filed an application to intervene and to be added as new parties and for an order of registration of the said certificate of sale issued by the Court's registrar.

PSK filed an application for an injunction restraining PBB and the bidders from proceeding further and for an order cancelling the contract and for redemption of the charged land.

Held:

[1] The chargee must be regarded as a vendor and had a statutory right of sale subject to judicial leave. The auction being a judicial sale was made under the discretion of Court as well as a direction under s. 257 of the NLC 1965. Therefore any action taken by the chargee was subject to the approval of the Court which required the chargor to be informed and heard.

[2] The said "conditions of sale", expressly subject to which also, the auction was held, must therefore be necessarily regarded as having been incorporated in the contract of sale signed by the successful bidders upon a successful bid being made at the auction.

[3] The chargee as vendor and the successful bidders as purchasers, being in the analogous position of two contracting parties, could vary the contract of sale in any manner they by consent thought fit subject to the approval of the Court, with the Court having to consider the interests of the chargor.

a [4] As the application for an order to extend the time for payment of the balance of the purchase price would affect the successful bidders, their application to intervene should be allowed.

[5] The chargee's application to extend time for payment at the request of the bidders should be approved as long as the principle of contractual freedom between the chargee and the bidders is not to the detriment of the chargor.

b [6] The chargee was granted an extension of time for payment of the balance of the purchase price within 30 days of an order removing the caveat lodged by the borrowing company.

[PBB's application for injunction dismissed.]

Cases referred to:

- c** *Malayan United Finance Bhd. Johore Baru v. Liew Yit Lan* [1990] 1 MLJ 317 (cit)
Siland Sdn. Bhd. v. M & J Frozen Food Sdn. Bhd. [1990] 2 MLJ 503 (cit)
Suppiah v. Ponnampalam, [1963] MLJ 202 (cit)
Lim Beng v. AVA [1922] 1 FMSLR 264 (cit)

Legislation referred to:

National Land Code 1965, ss. 257, 259(3)

- d** *For the plaintiff* - Ghanshamdas; M/s. Leong & Khoo
For the defendant - Choy Kam Lee; M/s. K.C. Lai & Co.
For the interveners - I. Raj; M/s. Raj Selva & Co.

JUDGMENT

Peh Swee Chin J:

e The plaintiff, (hereafter called the ('chargee')) obtained an order of sale of land owned and charged by the defendant (hereafter called the ('chargor'), and in a public auction held pursuant thereto, the land was sold to the interveners, (called the successful bidders); it having transpired that in fact only one of the successful bidders made the successful bid, and the contract of sale signed by the auctioneer was for sale of the land in question to that particular successful bidder "and or nominees", the other "successful bidder" being such nominee nominated to accept the transfer also, but nothing really turned on this.

f The successful bidders paid the 10% deposit towards the purchase price of RM140,000 and for the balance, obtained a loan from a bank (hereafter called UMBC bank). The arrangements as agreed among the successful bidders, UMBC bank and the chargee were such, that the balance of the purchase price was to be deposited with solicitors for the chargee and such solicitors would then pay their client, that is the chargee, only upon the registration of a new charge executed in favour of UMBC bank. The registration of that new charge would also of course be a contemporaneous affair with the registration of a certificate of sale (under s. 259(3) of the National Land Code) which was obtained from the Registrar of the High Court. The solicitors for chargee also acted for the successful bidders but only in the matter of obtaining the loan from UMBC bank the relevant transfer and the new charge.

g Meanwhile, the successful bidders were bound by the "condition of sale" emanating from the auctioneer under which the successful bid in question was made for the charged land in the first place. Clause (5) of such conditions of sale which gave rise to the controversy among the parties before me was in the following words:

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5. In default of payment of the balance of the purchase price within the period allowed the property shall again be put up for sale. The deposit after defraying the expenses of the sale shall be forfeited and the deficiency in price (if any) which may result on a resale or the balance of the purchase price if there is no resale, as the case may be, shall be recoverable from the defaulting purchaser. For the purpose of these conditions, the time allowed by condition 4 for the payment of the balance of the purchase price, namely three (3) months shall be deemed to be the essence of the contract.

a

The 3 months referred to the 3 months from the date of the sale, and the 3 month period lay at the centre of the problems herein.

b

In the meantime, the said certificate of sale and the new charge could not be registered due to the presence of a caveat lodged by a borrower of money secured in the first place by the charge in question on account of which the said sale by public auction was obtained by the chargee in these very proceedings; (the said borrower is hereafter called the borrowing company). The caveat was based, it seemed, on an agreement of purchase and sale in respect of the same charged land made between the chargor and the said borrowing company of which the chargor was then one of its directors. The chargee then filed an application in Court for the removal of the caveat; and this had not been heard yet when this Court made the order now presently appealed from.

c

Meanwhile the solicitors for the chargee could not pay the balance of purchase price to the chargee within the said period of 3 months, due to the non-registration of the said certificate of sale and the new charge in favour of UMBC bank according to the arrangements described above.

d

The stage was thus set for the confrontation between parties.

The chargee filed an application for extension of time for payment of the balance of the purchase price payable by the successful bidders within 30 days from the date of order of the removal of the said caveat; presumably to be made subsequently.

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The successful bidders also filed an application to intervene and to be added as new parties and for an order of registration of the said certificate of sale issued by the Court's Registrar and the consequential orders or directions.

f

The chargor filed an application for an injunction for restraining the chargee and the successful bidders, their servants etc. from proceeding further with the contract of sale (that is the said contract signed by the auctioneer); for an order that the said contract be cancelled and that the chargee be at liberty to redeem the charged land. The 3 applications were heard more or less together.

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In a nut shell, the submissions of Counsel are as follows.

It was submitted by learned Counsel for the chargor, *inter alia*, that the balance of the purchase price was not paid within the 3-month period by the successful bidders to the chargee, time was deemed expressly to be the essence of contract as stated in the "conditions of sale", the deposit of 10% paid by the successful bidders should have been forfeited pursuant to cl. 5 of the conditions of sale; and it did not matter that the existence of the caveat blocked such payment, the caveat having been there since about 3 years previously. The "conditions of sale" also had provided for resale to other bidders if the payment of price was not made. Since the Registrar's certificate of sale was not issued in accordance with the conditions of sale it was void. It was submitted further that another Judge of High Court in Ipoh High Court Civil Suit No. 23-516-86 had decided that such extension of time

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- a** (of the type asked for by the chargee for receiving payment of balance of purchase price) was refused. The chargor had deposed to an offer from one Howard Chou to buy the charged land at RM170,000 exhibiting a letter of intention to buy the said land from the said Howard Chou. *Malaya United Finance Bhd. Johore Baru v. Liew Yit Lan* [1990] 1 MLJ 311 was cited as authority also that the Court had no jurisdiction to extend time of payment of purchase price. The case of *Siland Sdn. Bhd. v. M & J Frozen Food Sdn. Bhd.* [1990] 2 MLJ 502 was also cited.
- b**

Learned Counsel for the chargee submitted that there was collusion between the chargor and caveator (that is the said borrowing company) and the chargee was thereby impeded and the application was filed on 30 April 1990 to remove it; therefore within the 3-month period. Further, it was submitted that contrary to the prohibition of condition 15 of the charge between the chargor and chargee (that is cl. 15 of the usual annexure to the relevant memorandum of charge) the chargor had entered into a sale agreement, with the said borrowing company, and that the cases cited for the chargor were distinguishable in that the purchasers there could not really pay up within the stipulated time. Learned Counsel further said he was acting for the chargee and the successful bidders and if all the documents were registered, they would have paid the money to the chargee.

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- d** It was further submitted for the chargee that the chargor was trying to obtain a benefit from his own wrong and that the Court had a discretion to do justice. If the Court was bound by such condition regarding the time for payment of the balance of purchase price, then any chargor would in future just lodge a caveat to prevent registration of certificate of sale and ask for forfeiture of deposits.

- e** Learned Counsel for the successful bidders gave a brief history leading to the present *impasse* and submitted that money was ready and all documents were executed, and the borrowing company's caveat was the only impediment.

- In my view, the chargee had a statutory right of sale subject to judicial leave. Please see *Suppiah v. Ponnampalam* [1963] MLJ 202. The chargee must be regarded as a vendor, please see *Lim Beng v. AVA* [1922] 1 FMSLR 264; *Malayan United Finance Bhd. Johore Baru v. Liew Yit Lan* [1990] 1 MLJ 317; *Siland Sdn. Bhd. v. M & J Frozen Food Sdn. Bhd.* [1990] 2 MLJ 503. The auction being a judicial sale would be under discretion of the Court, and also would be under such direction, in any event, by s. 257 of the National Land Code. Thus, the chargee, that is the vendor would have to do anything on notice to and subject to approval of the Court, thus requiring the chargor to be informed and heard.
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- g** The said "conditions of sale", expressly subject to which also, the auction was held, must therefore be necessarily regarded as having been incorporated in the contract of sale signed by the successful bidders upon a successful bid being made at the auction.

- There could be no doubt therefore that the chargee as vendor and the successful bidders as purchasers, being in the analogous position of two contracting parties could vary the contract of sale in any manner that by consent thought fit subject to the approval of the Court, with the Court having to consider the interests of the chargor.
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- If the chargee wanted to extend time for payment of any purchase price at the request of the successful bidder simpliciter, the Court would try its best to approve the same *inter alia*, on the underlying permeating principle of contractual freedom so long as the time asked for would not constitute undue delay to the detriment of the chargor on account of the continuing accruing interest, a *fortiori* when on the facts disclosed herein relating to the caveat lodged by the borrowing company, the Court was even more inclined to do so.
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Having regard to what has been stated above, I allowed the successful bidders to intervene, as the order for extension of time by the chargor would affect them one way or another. In other words, I made an order in terms of para. (a) of encl. 43 filed by the successful bidders.

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I further granted an extension of time for payment of the balance of purchase price within 30 days for an order removing the caveat lodged by the borrowing company in respect of which an application was then pending. In other words, I made an order in terms of encl. (37) filed by the chargee with costs.

b

I dismissed the application of the chargor for an injunction to restrain the chargee and the successful bidders from carrying on with the contract of sale, for such contract to be rescinded, for leave to redeem the charged land. In other words, I dismissed encl (41) filed by the chargor with costs.

I further made an order in terms of prayer (b) and (c) of encl. 43, that is for the new charge and the said certificate of sale to be registered and consequential directions to the Registrar of Titles, Perak with costs. On its own motion, this Court further made an order of stay of execution in respect of orders made on the said prayers (b) and (c), until further order from this Court, after the Court was informed, in the middle of hearing, of yet another caveat in fact having been lodged against the charged land by the said Howard Chou and the application for its removal was also pending.

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Also found [1991] 3 CLJ 2560

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